SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 77

CHARLES S. LOBINGIER,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND ARGUMENT IN SUPPORT THEREOF.

CHARLES S. LOBINGIER,
Pro se.

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No. 973

CHARLES S. LOBINGIER,

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PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioner prays for a writ of *certiorari* to review the judgment of the United States Court of Claims, sustaining the demurrer to, and dismissing, his petition below,[1] whose averments are admitted by the demurrer,[2] and which constitutes petitioner's statement of facts here.

The question presented is

> Must a government official or employe, who has been allowed two years for the *transportation* of his household goods, wait until the end of that period

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[1] See Record, pp. 1-5.

[2] "• • • every uncontradicted allegation of fact by the unsuccessful party must be taken as true". Postal etc. Co. v. Newport, 247 U. S. 464, 474. "• • • and in determining their legal effect • • • we are at as full liberty to consider them as was the state supreme court". *Truax* v. *Corrigan*, 257 U. S. 312.

for reimbursement of "expenses * * * for the packing, crating and drayage", which the act of October 10, 1940 requires to "*be allowed and paid WHEN specifically authorized or approved by the head of the department or establishment concerned*"?

Reasons for Granting the Writ and Specifications of Error.

1. The case involves the interpretation of this recent Act of 1940 which affects the interests of thousands of government workers and was never before judicially construed.

2. The decision below was rendered by a divided Court, only two others of the five judges concurring with the author thereof, and petitioner submits that the minority opinion is much the sounder, juster and more logical.

3. The majority opinion wholly ignores the history of federal legislation on the subject, the conditions under which the present statute was enacted, the change of language therein, and especially the clause prescribing the time for reimbursement.

4. Said opinion cities not a single authority, but leans heavily on the comptroller general's action, assuming for him powers which he does not possess, but disregarding his one decision (5 C. G. 229) in point here, and thereby creating a conflict.

5. Said opinion errs in substituting speculation for proof and relying upon assumptions and conjectures which have no support in the record.

6. Said opinion errs in relying (pp. 7, 8) upon the titles of the Act in question and of the executive order accompanying it, and fails to decide expressly the one question before the lower court, viz. the sufficiency of plaintiff's petition.

Argument.

1. (*Supporting specifications 1-3 p. 1 supra.*)

Let us notice first, statutes preceding the Act of 1940 and their application by the Comptroller.

The act of May 27, 1908 (35 Stats. 392) provided for "freight, transportation and travelling expenses" for the "public health and marine-hospital service"; but a surgeon's claim of reimbursement "for boxing for shipment a piano, trunk and sundries" was rejected (15 Comp. Treas. Dec. 731). Under the act of March 4, 1911 (36 Stats. 1265) providing for "transportation", a weather bureau employe was refused reimbursement for expenses of uncrating furniture following a change of station (27 Comp. Treas. Dec. 261). Under the act of Feb. 17, 1922 (42 Stats. 366, 386) providing "for the *transportation* of household goods *incident to change of headquarters*", reimbursement of expenses for drayage, unpacking and uncrating was denied (2 C. G. 598). The act of Jan. 25, 1929 (45 Stats. 1119) provided for "transportation and subsistence" of Bureau of Foreign and Domestic Commerce employees "when travelling" etc. Reimbursement for storage was refused as "not incidental". (9 C. G. 517). The act of April 27, 1938 (52 Stats. 274) provided for "transportation . . . of families and effects of officers and employees of" the same bureau. A Trade Commissioner, transferred to a new post, was denied reimbursement for shipment of household goods because "*by reason of delay*" it was not "necessary, incident to, or by reason of, *such transfer*," (18 C. G. 408, italics supplied). It will thus be seen that the Comptroller has construed these older statutes almost uniformly against the official, as *not* making "packing, crating and drayage", "incidental to transportation" and *excluded* them. Now that the statute expressly does *include* them, he holds that they *are* "incidental to transportation"

and refuses reimbursement until the latter takes place—a complete *volte face.*

Such was the situation which faced the President in 1940 when, as the Court will judicially notice (*Clark* v. *U. S.* 99 U. S. 493, 495), World War II, then raging for over 13 months, rendered it probable that our country would soon be involved. With means of information not available to the public, he foresaw the necessity of unprecedented shifts of our government personnel from the capital and sought to make the process as painless as possible. To correct uncertainties and ambiguities in the older acts and to eliminate the hair splitting and cheese paring construction thereof, shown above, the act of Oct. 10, 1940 was enacted requiring

> "That expenses which now or hereafter may be authorized by law to be paid from Government funds for the *packing, crating, drayage* and *transportation* of household goods and personal effects of civilian officers and employees of any of the executive departments or establishments of the United States when transferred from one official station to another for permanent duty, *shall hereafter be allowed and paid, when specifically authorized or approved by the head of the department or establishment concerned* (italics supplied).

Here, it will be seen, the Comptroller General's denials of reimbursement for "packing, crating and drayage" are overruled by Congress and each of those items is provided for separately, distinctively and independently from transportation and with equal prominence. The statute might have read "transportation *including* packing, crating and drayage" (or "incidental" thereto); but it does not. Is it not clear that these changes reveal the legislative intent to set aside the Comptroller General's narrow rulings and establish a more liberal policy toward the "decen-

tralized'' personnel? The Petition (4) alleges, and the demurrer admits, that this act of 1940 was ''to protect the government personnel from the loss and hardship as a result thereof'', and as this Court said in *A. Bryant Co.* vs. *Steam Fitting Co.*, 235 U. S. 327, 339 ''. . . the act . . . is highly remedial and its provisions must be adapted to fulfill its whole purpose''. Even if its meaning were doubtful it should be so construed ''as to effect the general purpose of Congress'' (*P. R. Co.* v. *Mor*, 253 U. S. 345, 348 & Cit.). Those purposes are further manifested in Ex. Order 9122 which, as supplemented by petition's Ex. 3, give plaintiff until March 16, 1944 to avail himself of the privilege of transportation—the ''packing, crating and drayage'' having been completed and paid for by the shipper. But if the parties for whose benefit this act was designed must wait two years for reimbursement, the privilege of transportation imposes a burden which, it is inconsistent with the President's attitude to assume, was intended. Yet, ignoring this elementary doctrine, which was pressed upon the lower court in plaintiff's brief, the majority opinion adopts (p. 9) the narrowest possible construction of the statute, denying ''separate reimbursement for the separate items mentioned'' therein. The reason alleged for such denial is that ''separate reimbursement . . . would create such confusion and possible waste'', etc. (Cf. p. 8); but here the opinion speculates and ignores the petition which alleges (5) that plaintiff, with his agency's approval, ''employed the . . . company whose bid was the lowest for packing, crating and drayage'' of the items in question. Surely that suffices at least to raise a presumption against waste. And here the minority opinion (p. 11) is unanswerable in showing that plaintiff is entitled in any case to recover for the items claimed, ''provided their cost does not exceed'' that of transportation to ''Philadelphia by the most eco-

nomical means", plus the preparatory expenses. But if economy is the chief object, why transport at all? Is it economy for the government to force the official or employe to ship his goods to Philadelphia in order to obtain reimbursement for necessary "packing, crating and drayage"? Would it not be the gainer by reimbursing him for the expense actually incurred, without compelling the much greater expense of transportation? The minority opinion is again unanswerable in saying (p. 10) "I cannot ascribe to Congress an intention to make transportation a prerequisite to reimbursement for expenses incurred, however foolish such transportation would have been."

And would there not be less "confusion and possible waste" from the course followed by plaintiff than by the "partial shipment" plan[3] expressly authorized by the April 28, 1942, Supplement to the Regulations? And since there may be "instalment shipments", why not instalment reimbursements? Surely one is just as consistent with the language of the act and the executive orders as the other. Finally, if there can be no "separate reimbursement for separate items", why does Ex. Ord. 8588 (15) require that "the total charge for the services shall be itemized so as to show the charge for each service"?

Unfortunately, the majority opinion (p. 6) quotes the statute down to the clause italicized above (p. 4) and stops there in the midst of the sentence. Yet that clause is the crucial one of the entire statute and it is not only omitted there but is not even mentioned elsewhere in the opinion. Petitioner submits that such omission vitiates the entire decision; for without that clause the statute cannot be understood nor interpreted for this case. That clause pre-

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[3] "The Government will undertake to transfer the household goods of employees who desire to make a partial shipment from Washington and within 6 months thereafter, to ship the remainder to the new location."

scribes expressly "*when* (the) expenses . . . shall be allowed and paid". It is "*when* they are specifically authorized or approved by the head of the establishment". The demurrer admits plaintiff's transfer "for permanent duty", pursuant to said act and to the above mentioned order" (of "the head of the . . . establishment"), payment of $127.50 for "packing, crating and drayage" and the specific approval of said head in Ex. 3 attached to the Petition. Petitioner submits that said order relates back to, and confirms, "the approval of the chief of said Commission's Budget and Accounting Section", whose action must in any event be presumed regular and in accordance with the Chairman's instructions, (*Quinlan* v. *Green County*, 205 U. S. 410, 422; *Consol. Ed. Co.* v. *N. L. R. B.*, 305 U. S. 197, 226 (1936)) and that the latest date to which reimbursement could legally be deferred would be Sept. 9, 1942, when the Commission's Chairman approved the expense and extended the time for transportation. Petitioner's rights must be determined as of that date. The majority opinion makes no point, however, as to the *date* of approval; its position is that no reimbursement for any step might be made until all four steps have been taken. Not only is this inconsistent with the crucial clause italicized above, but the majority opinion expressly contradicts it by asserting (p. 9) "the absence of statutory language clearly so stating" (i. e. "the right to separate reimbursement)." What language could be clearer than that requiring reimbursement "when specifically authorized" etc.? How could the majority opinion have ignored this direction and sought support for its position in such phrases as "incident to transportation" (p. 7) etc., "in connection with transportation" (p. 9), which are not in the present statute nor in any previous one, but originated with the Comptroller General?

2. *(Supporting specification 4, supra p. 1).* The opinion recites (p. 9) that "the Public Buildings Administration and the Comptroller General . . . encountered the statute before we did" and accepts their conclusions as "not unreasonable". Of course in this class of cases the administrative officers always "encounter the statute before" the Court of Claims does; but are their conclusions any weightier on that account? If so the claimant in such a case will always be at a disadvantage and one is tempted to ask, Why was the Court of Claims established? In this case at least the "encounter" yielded nothing; but the question here is not the "reasonableness" of their conclusions but the sufficiency of the petition. And heretofore the lower court has not been so ready to accept such "conclusions".[4] Indeed that court seems to have found it necessary to reverse the Comptroller General oftener than to sustain him. Congress overruled him in the very statute here involved and the President recently reversed him on a question of wages.

But if the majority desired to follow the Comptroller General because he "encountered the statute before we did", why did it not go back to the first and only previous decision (5 C G 229) where this precise question was determined and which the minority opinion (p. 12) well says "should be the guide for the decision in this case". There an officer was transferred from Norfolk to Washington, where, previously, he had stored his household goods. Reimbursement was allowed for drayage to his new residence tho "transportation had not occurred" nor was the drayage "incidental to transportation"—a sound and common sense ruling. But had the Comptroller General applied the same

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[4] See e. g. *Thomas* v. *U. S.*, 87 Ct. Cls. 573 (1938) ("patently erroneous"); *Schmoll* v. *U. S.*, 91 ib. 1 (1940); *Regnier* v. *U. S.*, 92 ib. 437 (1941); *H. W. Sweig Co.* v. *U. S.*, ib. 472 (1941).

line of reasoning as in his decision here, he would have told the officer: "You must send your goods back to Norfolk, have them unpacked and uncrated, then repacked and recrated and transported at government expense before I can allow anything for drayage." The conflict thus created "is a sufficient ground for the writ."[5]

The majority opinion quotes (p. 7) what it states are the reports of Congressional Committees on the act while pending and claims that it was "the result (*sic*) of a recommendation of the Comptroller General". The passage quoted merely says that "the Comptroller General recommends that legislation be enacted" etc.; but contemporaneous history, of which the Court will take judicial notice (*Clark* v. *U. S. supra* p. 4) indicates more strongly that the initiative came from the President. For *the Comptroller General appears wholly oblivious of the difference in phrascology between the acts above mentioned and that of Oct. 10, 1940.* Nowhere in his decision does he recognize any change of policy as reflected in the new act. When he refers to it, he treats it just like the old ones. Yet if it had been drafted in his office, or under his direction, he would surely have observed the obvious difference. Of course, he "recommended" legislation if the President sponsored it; but that is quite different from initiating it. And if the Comptroller General did "recommend" it, his action must have been merely perfunctory for he nowhere seems to sense its real significance. Again *the regulations (Ex. Order 8588) for carrying into effect the act of 1940 were drafted in advance of the latter's passage.* This appears from the "effective date" of the order (Sec. 17) which was the date of the act's passage, viz. Oct. 10, 1940. The order must have been all ready for the Presidential signature as soon as enactment was announced. Not only

[5] See Robertson, Jurisdiction of the Supreme Court, Sec. 333.

so, but Ex. Order 9122, further easing the burdens and hardships of "decentralization", was issued only four weeks later and but one year and one month before Pearl Harbor.

The majority opinion (p. 8) misconstrues Ex. Order 8588 (5) providing for "shipment * * * by the most economical means" etc. and holds in effect that it authorizes the Comptroller General to dispense with drayage and crating at his option. But if he may do that with these items he may do it with packing. Would any sane person trust such fragile goods as glassware, chinaware and other crockery, mirrors, book cases with glass doors, pianos and other musical instruments, sewing machines, radios, books, frail chairs and tables, to the tender mercies of a motor van driver for a haul of 135 miles over a road none too smooth, dumping them in without even packing them? As regards the claim (opinion p. 8) that "It would not be possible to ascertain whether, and how much, crating and drayage were compatible with 'the most economical means of transportation' ", it should suffice to point out that petitioner's goods had been packed and hence "ready for shipment to the new station" ever since March 16, 1942 so that it has been perfectly feasible for the Comptroller General "to determine the most economical means" of shipment. That was known to the Public Buildings Administration as soon as plaintiff's bill was presented in March, 1942.

All three of these items are statutory rights which cannot be taken away by an executive order. Nor does Ex. Ord. 8588 (5) purport to do so. "Shipment" is merely a synonym for "transportation", which, by the 1940 statute, is distinguished and segregated from "packing, crating and drayage", *preparatory* to transportation. "Means of Shipment" (i. e. medium of transportation) refers to the type of carrier; it has nothing to do with the three preparatory steps except that their "*cost*" may be con-

sidered in choosing between motor van, rail or water. Yet the opinion assumes (p. 9) that some "administrative officers" may dispense with at least two of these prescribed, preparatory steps. This contradicts the statute which *requires* reimbursement for all items "*when* specifically authorized", etc. It might as well be claimed that they could dispense with transportation. "Where a statute creates a new right * * * and provides a specific remedy * * * such provisions are exclusive." *Barnett* v. *Bank*, 98 U. S. 555.

3. (*Supporting Specification 5, supra p. 1.*) Beside accepting the Comptroller General's "conclusions" the majority opinion does little more than speculate (pp. 8, 9) on what "is likely", or "possible", or what "the transportation could probably be". Especially unwarranted are the assumptions (p. 8) that the goods "could be shipped more economically by being placed directly into a moving van from the employe's home" and that there was "a door-to-door van from Washington to Philadelphia". There was in fact no such van. That which the government provided started from the Commission's building at 20th & Pa. and was a non-stop carrier, unless, by *special concession*, additional goods were loaded at a place along the direct route to Philadelphia. The petition below (5) alleges that plaintiff left his goods at such a place (920 E. St., N. W.—the Transfer Company's plant) whose location the Court may judicially notice,[6] "preparatory to the transportation thereof to Philadelphia", and hence ready for "the common carrier", as provided in Ex. Ord. 8588 (4).

But even had there been "a door to door van from Washington to Philadelphia" on Mch. 16, 1942, petitioner was not required to avail himself thereof. He had two years then to move his goods and, as the minority opinion points

[6] "Judicial notice is taken of streets * * * location, general direction" etc. 23 Corpus Juris, p. 87, sec. 1875.

out, (p. 11) plaintiff was not restricted to government transportation at all but was authorized to use "other means".

Similar is the assumption (maj. op. p. 9) that "it is entirely possible that some of the expenses already incurred (for crating and drayage) may not be reimbursable at all". It has just been shown that the drayage was to the common carrier, pursuant to Ex. Ord. 8588. For crating, the Transfer Company made no extra charge; the china and glassware were packed in barrels called "crates" but all were billed as "packing".

4. *(Supporting Specification 6, supra p. 1.)* That the title of the 1940 act uses only the word "transportation" means nothing when the body of the act provides for much more; nor need "the title to an act of Congress, be looked to in ascertaining the intent" (59 Corpus Juris 1008, sec. 599); for ". . . *we have only to look to the body of the act to ascertain its intention*" (Italics supplied; *Hough* v. *Porter,* 51 Oregon 318). As the minority opinion (p. 11) well points out, the sole question submitted to the Court was whether plaintiff's petition states a cause of action. There is no express finding that it does not; and its insufficiency is not shown by indulging in the speculation just reviewed. But the majority opinion barely notices the petition and certainly fails to point out wherein it is deficient. The government, after carefully conferring with other agencies, accepted the recitals therein as correct and since there is no real dispute about the facts, petitioner prays that the judgment of the lower court be reversed with instructions to enter one for petitioner for the full amount claimed together with interest and costs.

Respectfully submitted,

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Pro se.

(1918)